84-731

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR., PETITIONER

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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QUESTIONS

I. Did the District Court have jurisdiction to hear this case after entering an order May 19, 1983, abandoning the real estate and property which is the subject of this suit and allowing the creditor to realize on its security interest?

II. Did the District Court err in ruling that the substitute trustee under a deed of trust did not have a conflict when said trustee was an attorney for note holder-creditor NCNB Financial Services and represented them in litigation which involved the amount due under the deed of trust?

III. Did the District Court err by holding that a valid sale was created between NCNB Financial Services and Pulaski Furniture despite their lack of agreement as to the disposal of the fixtures at the July 15th auction?

LIST OF PARTIES

IN RE:

COLEMAN FURNITURE CORPORATION,

DEBTOR

JOSEPH B. SHUMATE, JR.,

PLAINTIFF-APPELLANT

VS.

JAMES F. DOUTHAT,
SUBSTITUTE TRUSTEE DEFENDANT-APPELLEE

PULASKI FURNITURE CORPORATION
DEFENDANT-APPELLEE

NCNB FINANCIAL SERVICES
DEFENDANT-APPELLEE

Donald E. Earls, Gregory M. Stewart, John C. Quigley, Jr., and Max Jenkins (Jenkins & Quigley on brief) for Appellant; Benjamin C. Ackerly (T. Justin Moore, III, and Hunton & Williams on brief) for Appellee Furniture Corporation; Thomas A. Leggette (William B. Poff, Daniel F. Layman and Woods, Rogers, Muse, Walker and Thornton on brief) for Appellee. James F. Douthat; Stephen M. Hodges (Penn, Stuart, Eskridge & Jones; George V. Hanna, III; Hayden J. Silver, III; More, Van Allen & Allen on brief) for Appellee NCNB Financial Services, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO._____

JOSEPH B. SHUMATE, JR., PETITIONER

V

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL

PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATEJUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Joseph B. Shumate, Jr., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on July 23, 1984.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Fourth Circuit (unpublished) is printed in Appendix A hereto, page _____.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 23, 1984. The Jurisdiction of the Supreme Court is invoked under 28 USCS § 1251 to 1257.

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

On November 3, 1982, Coleman Furniture Corporation ("Coleman") filed a Chapter 11 Bankruptcy petition. The debtor remained in possession. Thereafter, the debtor was found to have violated a court order in respect to the use of cash in the operation of Coleman.

Shortly thereafter, on February 18, 1983, a trustee in bankruptcy was appointed and directed to take possession of all property of the debtor.

The trustee in bankruptcy made attempts to sell the property as a going concern but these attempts which included an offer of $3,550,000.00 from DMI Furniture, Incorporated, failed.

After the failure of the trustee in bankruptcy to sell this business, the trustee in bankruptcy abandoned this property. The court found that continuation of this business was not feasible and

on May 19, 1983, the "Order of Abandonment" was entered. In part it states:

"Accordingly, it is hereby ADJUDGED and ORDERED that:

> 1. All of the assets of the debtor, excluding choses in action, the debtor's pension fund and certain monies to be held by the trustee as hereinafter described, as abandoned from the debtor's estate to Financial Services and the stay in effect pursuant to 11 USC § 362 is modified as to Financial Services to allow Financial Services to take possession of all assets abandoned herein and to realize on its security interest in said assets ...
>
> 8. This proceeding is continued on the docket of this court for a report concerning any sale of the assets of Coleman, any administrative expenses incurred in this proceeding, the report of Raymond R. Robrecht of the acceptance or rejection of the offer of Financial Services to the unsecured creditors, and the report of Financial Services of the application of monies paid to and on the outstanding indebtedness secured by said assets, together with such other matters as may be probable before the court..."

The Appellant, Joseph B. Shumate, Jr., is a major stockholder in Coleman and is a guarantor on a loan to NCNB Financial Services. The Appellant in the bankruptcy proceeding, and prior to the events that will be described hereinafter, had instituted a suit against NCNB Financial Services in which he alleged that an excessive rate of interest had been charged Coleman by NCNB Financial Services. This suit is presently pending in the United States District Court for the Western District of Virginia. If the Appellant is correct in this suit, it would reduce and otherwise effect the amount due to NCNB Financial Services.

On May 23, 1983, NCNB Financial Services executed an instrument appointing James Douthat and Thomas Palmer as Substitute Trustees under a deed of trust by and between Coleman and John B. Spiers, Jr. and Duane E. Mink. Mr. Douthat, who would

ultimately act as the sole trustee under the deed of trust, was the attorney of record for NCNB Financial Services in the interest suit filed by Shumate. Mr. Douthat continued in his capacity representing NCNB Financial Services in the interest rate suit.

On June 7, 1983, Mr. Douthat, acting in his capacity as trustee under the deed of trust, delivered letters to the Appellant, Coleman, and the trustee in bankruptcy declaring the unpaid balance payable forthwith and advising of foreclosure as not paid.

Mr. Douthat, again acting in his capacity as trustee under the deed of trust, on June 24, 1983, advised that there would be a separate public auction of the equipment and remaining inventory of Coleman.

The Appellant, Shumate, assuming that the United States District Court had no jurisdiction because of the abandonment by the trustee in bankruptcy, on July 12, 1983, brought an action in the Circuit Court of Pulaski County to enjoin Appellee Mr. Douthat in his capacity as trustee from selling certain real estate. The Circuit Court Judge of Pulaski County as a hearing ruled that he did not have jurisdiction. (This argument was advanced by Mr. Douthat who, at that time, was representing himself as trustee and Appellee NCNB Financial Services in the injunction proceeding.) The injunction suit was dismissed and later a similar injunction was dismissed in the United States District Court by the Honorable James Turk.

The deed of trust to be foreclosed by Mr. Douthat had been executed by Appellant and Coleman on December 28, 1977, granted

certain real estate to the trustee, and in addition thereto:

> "with all fixtures, equipment and rights attached or appurtenant to the Property, including, without limitation, all water and sewer contract rights, mineral rights, gas rights, water and water rights, all electric lighting fixtures heaters, furnaces, incinerators, stokers, gas or oil burners, heating controls, motors, fans, tanks, fixtures, heating, cooling, plumbing, gas, electric and air conditioning fixtures, machinery and equipment and other equipment of every nature and kind...."

The advertisements which were run in the newspapers by Mr. Douthat, trustee under the deed of trust, stated as follows:

> "Pursuant to the terms of a certain deed of trust dated December 28, 1977 ... etc., executed by Coleman Furniture Corporation ... etc., the undersigned substitute trustee, duly appointed as substitute trustee ... etc., will on the 15th day of July, 1983, at 12 Noon ... sell at public auction the following described real estate."

On July 15, 1983, the foreclosure sale under the deed of trust took place at the steps of the courthouse. The property was not sold as advertised. Apparently Mr. Douthat, the trustee under the deed of trust, intended to exclude all personal property, including fixtures.

Appellee Douthat began the auction by announcing that equipment and machinery would be sold separately in August. He advised those in attendance, which included the Appellant, Shumate, that the appraisal he had with him would serve as the basis for determining whether an item was personal or real property. He asked if anyone had questions, but no one responded. Additionally, he also indicated that if there was a question in anyone's mind as whether a particular item was included, then the item should be presumed to be personal property.

According to the Appellant Shumate, Appellee Mr. Douthat announced he would only be selling the real estate and the four walls.

Among those attending the sale, besides the Appellant Mr. Shumate, were T.G. Wampler and Ira Crawford, representatives of Pulaski Furniture Corporation,who were interested in purchasing the real estate. Also in attendance was Marvin Barman, who was an agent of NCNB Financial Services.

After attempting to sell the real estate in separate tracts (part of the real estate was located in the Town of Pulaski, part of the real estate was located in the Town of Dublin), Douthat sold the entire tracts to Pulaski Furniture Corporation for $2,000,000.00. The high bid was submitted on behalf of Pulaski Furniture Corporation by T.G. Wampler and Ira Crawford, agents of the

said Furniture Company. Unknown to your Appellants, subsequent to the foreclosure sale, a dispute arose between NCNB Financial Services and Pulaski Furniture Corporation whether certain items of personal property, which were affixed to the building, were in fact sold as part of the foreclosure sale of the real property. Your Appellants did not learn of the above stated facts until March 1, 1984, when your Appellants took the depositions of Marvin Barman, T.G. Wampler and Ira Crawford and the understanding was of your Appellant from the depositions of the above mentioned persons that there was no "meeting of the minds" between NCNB Financial Services and Pulaski Furniture Corporation as to what was actually sold or purchased. These depositions were filed in this case and used by both parties in trial briefs and memorandums.

As a result of he dispute, NCNB Financial Services agreed to purchase and Pulaski Furniture Corporation agreed to sell its $2,000,000.00 bid to Appellee NCNB Financial Services. Appellee NCNB Financial Services then returned to Appellee Pulaski Furniture Corporation its $2,000,000.00 earnest money deposit plus interest.

Appellant, after taking of the depositions on March 5, 1984, amended his complaint which included the above facts and alleged a rescission of the contract of sale which occurred between NCNB Financial Services, Trustee Douthat and Pulaski Furniture Corporation on July 15, 1983.

On or about August 15, 1983, your Appellant filed a complaint in the Circuit Court of Pulaski County, Virginia, seeking to set aside the foreclosure sale fairly and impartially and as a result the

property was sold for a grossly inadequate price which was subsequently amended two times. (Again, the Appellant assumed jurisdiction would be in a state court due to the order of abandonment.) In connection with the said complaint, your Appellant filed a Memorandum of Lis Pendens.

On November 8, 1983, the suit filed by your Appellant in the Pulaski County Circuit Court was transferred by agreed order to the United States District Court for the Western District of Virginia. Also, on November 8, 1983, NCNB Financial Services assigned the $2,000,000.00 bid back to Pulaski Furniture Corporation in whom title currently vests.

On December 29, 1983, the Honorable Judge Turk ordered that 11 issues involving or affecting Pulaski Furniture Corporation shall be, and hereby are,

transferred to the Honorable Glen M. Williams for "whatever proceedings and disposition as may be appropriate."

The trial on the issues was convened on April 5, 1984, in the aforesaid Court with the Honorable Glen M. Williams, Judge, presiding with an advisory jury. The Defendant-Appellees, Pulaski Furniture Corporation, Douthat and NCNB Financial Services, filed a motion in limine to prohibit the plaintiff from using testimony obtained through depositions concerning Marvin Barman's testimony, Ira Crawford's testimony, B.C. Wampler's testimony, and T.G. Wampler's testimony that there was no meeting of the minds between NCNB Financial Services and Pulaski Furniture Corporation, the said motion having been overruled by the Court.

At the conclusion of your Plaintiff's evidence, the Defendant-Appellees made a motion for a directed verdict and judgment

in favor of the Defendant-Appellees, which said motion was granted by Judge Williams. The opinion cited from the Bench totally disregarded the testimony of your Plaintiff-Appellant at a state in the proceedings when the case should be decided in a light most favorable to the plaintiff.

Your Plaintiff-Appellant subsequent to the directed verdict granted by the Court filed a motion for a new trial, which said motion was denied. Thereafter, your Plaintiff-Appellant filed a Notice of Appeal to the Court's ruling of April 6, 1984, granting the Defendant-Appellee's motion for a directed verdict and judgment for the defendants. Thereafter, on May 15, 1984, bond hearing was had at which time Judge Williams set an appeal bond of $2,000,000.00, which your plaintiff

appealed and the said bond was subsequently reduced to $5,000.00.

This action is from an order of the Honorable Glen M. Williams which was entered along with an opinion from the Bench dated April 6, 1984, in which his Honor granted the Defendant-Appellees' Motion for a directed verdict and judgment in favor of the Defendant-Appellees. This judgment was subsequently affirmed in the U.S. Court of Appeals for the Fourth Circuit dated July 23, 1984.

It is this Order from which the Appellant seeks relief.

1. DID THE DISTRICT COURT HAVE JURISDICTION TO HEAR THIS CASE AFTER ENTERING AN ORDER MAY 19, 1983, ABANDONING THE REAL ESTATE AND PROPERTY WHICH IS THE SUBJECT OF THIS SUIT AND ALLOWING THE CREDITOR TO REALIZE ON ITS INTEREST?

Before this encumbered real estate was abandoned, the trustee in bankruptcy

took title. However, the Court found to continue this business was not feasible.

After proper notice, the trustee in bankruptcy may abandon burdensome property or property of inconsequential value. 11 USCS § 554(a)(b).

On May 19, 1983, this property was, by Court Order, "abandoned from the debtor's estate." The mortgagee (NCNB Financial Services) was allowed "to take possession of all assets abandoned herein and to realize on its security interest in said assets." The Order of May 19, 1983, continued the proceeding only for a "report concerning the sale of the assets," administrative expenses, application of monies paid, outstanding indebtedness secured by assets, etc.

Property which has been abandoned under 11 USCS § 554(c) scheduled and not administered is deemed abandoned to the bankrupt (Coleman) debtor. This rule

apparently resulted from prior law giving the bankrupt the right to assert title to property abandoned by the trustee in bankruptcy.

NCNB Financial Services did take possession. They appointed a substitute under the deed of trust, who was employed by them in litigation with coleman, and thereafter other procedures were followed as required by Virginia state law to foreclose.

In Bushong v. Theard, 37 F.2d 690 (5th Cir. 1930), it was held where property is mortgaged to an amount leaving no equity for a bankrupt estate, the enforcement of the mortgage should be left to the state courts.

The Appellant first brought this action in the Circuit Court of Pulaski County contending that only a state court had proper jurisdiction. However, the

Appellee convinced the state court that proper jurisdiction was federal.

The law is clear that jurisdiction of bankruptcy courts are limited. Objections to the subject matter of jurisdiction cannot be waived nor can there be consent to such jurisdiction. Re Roberts, 460 F. Supp. 88 (N.D. Ga. 1981).

It is submitted that the proper jurisdiction for this action was the Circuit Court of Pulaski County.

At 9 Am. Jur. 2d page 450 § 256 Effect of abandonment or failure to abandon, it is stated:

> "Abandonment may be to any party with a possessory interest in the property abandoned. Property which has been abandoned under 11 USCS § 554(c) because scheduled and not administered, it has been said, is deemed abandoned to the debtor. This result apparently follows prior law which gave the bankrupt the right to assert title to property of the state upon abandonment by the trustee. Such revesting of title may be irrevocable, in light of cases decided under the

> 1898 Act indicating that the trustee is precluded from reclaiming property of the state which has already been abandoned, moreover, there is authority under the Bankruptcy Act of 1898 to the effect that the abandonment relates back to the date of filing of the petition."

There are cases in which state courts have taken jurisdiction of matters involving a trustee in bankruptcy.

In Irvin, et al v. Harris, et al, 127 S.E. 529, 189 N.C. 465 (1925), a Trustee in Bankruptcy intervened in a state action to recover money which resulted from the sale of real estate. The Trustee in Bankruptcy was unsuccessful since the bankruptcy court, by Order, had abandoned this real estate. In this case, there had been an increase in the real estate which was not foreseeable.

In order for a bankruptcy court to have jurisdiction of abandoned property, jurisdiction must be conferred by law.

For example, the determination of a nondischargeable debt may confer jurisdiction to determine matters involving the title to property.

In the case of Re Roberts, 460 F. Supp. 88 as a prerequisite to determining if a claim is nondischargeable property may be litigated.

In Roberts, the plaintiff brought a complaint to determine the dischargeability of debts pursuant to Rule 409 (Jurisdiction is conferred exclusively in the Bankruptcy Court for such a determination. It may also render judgment therein and decide any remaining issue.) 11 USC § 35(c)(e).

The Bankruptcy Judge set aside a deed between Plaintiff and the Bankrupt on a finding of inadequate delivery and also cancelled a trust deed, and gave the Plaintiff immediate possession of the property. This relief had not been

requested, and the property had been abandoned.

The Court held that a ruling on the title to the real estate and trust deed were a prerequisite to deciding dischargeability of the debt.

The case of Re Green Mountain Meadows, Inc. (1978, F BC D.C. Vt.) 4 BCD 1266, 19 CBC 586 held that a Trustee in Bankruptcy is divested of title to property upon abandonment, such that the bankruptcy court no longer effectively exercised jurisdiction over it.

Upon the point of jurisdiction, the case of Re Polumbo (1967, W.D. Va.) 271 F. Supp. 640 is submitted. This case involved a dispute over payment of real estate tax between the trustee under a deed of trust and the bankrupt's estate. An Order of abandonment had been entered on the encumbered real estate. The

Referee in Bankruptcy allowed the Bankruptcy Trustee to cooperate with the trustee under the deed of trust so that the property (motel) might be sold as a going business.

This case stated that once the Trustee in Bankruptcy abandoned an asset, the trustee is "absolutely precluded from later reclaiming it" even if there has been a later increase in its value.

The court went on to further say (P642):

> "Since abandonment has no effect on the validity of the liens encumbering the property (Collier ¶ 70.42 [4]n. 19a) the practical effect of the election is to remove the asset entirely from the jurisdiction of the bankruptcy court."

In the case at bar, there was no reason nor any statutory authority for the bankruptcy court to continue jurisdiction over the real estate in question. It is submitted that the proper forum to

litigate this matter is in the Circuit Court of Pulaski County.

2. DID THE DISTRICT COURT ERR IN RULING THAT THE SUBSTITUTE TRUSTEE UNDER A DEED OF TRUST DID NOT HAVE A CONFLICT WHEN SAID TRUSTEE WAS AN ATTORNEY FOR NOTE HOLDER-CREDITOR, NCNB FINANCIAL SERVICE AND REPRESENTED THEM IN LITIGATION WHICH INVOLVED THE AMOUNT DUE UNDER THE DEED OF TRUST?

Some time before the sale of the real estate Appellee Douthat had been retained and was being paid by Appellee NCNB Financial Services to represent them in pending litigation in the District Court. This litigation involved a dispute over the interest rate in the note that would later be "foreclosed." Under the deed of trust Appellee NCNB Financial Services could appoint and did appoint Appellee Douthat as trustee, who sold the property involved. At the time of the sale and thereafter the litigation was still pending.

The trustee, in the case of a deed of trust, is the agent of both the owners of the property and of the secured debt, and it is his duty in selling the property to act without partiality toward either of them. (55 Am. Jur. 2d § 699, 640; White v. MacQueen, 360 Ill. 236, 195 N.E. 832).

Courts have held that a trustee in exercising power of a sale, should scrupulously avoid placing himself in a position where his interest might conflict with the interest of those he represents. In fact, he will not be allowed to place himself in such a position that he may not perform his duty to the owner of the equity of redemption. (55 Am. Jur. 2d § 699, 640).

It is submitted that there was a conflict on the part of the trustee, under the deed of trust. The following is from 13A Michie's Jurisprudence:

> § 47. Who May Be Trustee. It is held that where the parties agree that their respective counsel may act as trustees, it may be done. But where there is but one trustee, he ought not to be counsel of one of the parties, especially, where he may have to decide questions which may be of vital interest to the adverse party. An Attorney for the creditor is not incompetent to act as trustee in a deed of trust securing a debt; but being then the agent of both parties he is bound, in executing the trust, to act honestly and impartially between the parties, and endeavor by proper notice and otherwise to obtain the best price for the property, and if necessary, to invoke the aid of a court of equity in doing so.

The undisputed facts reveal that Appellee Douthat was representing NCNB Financial Services in a dispute over the interest rate called for in the note. This litigation over the interest rate of the note was in progress at the time Mr. Douthat was appointed as trustee under the deed of trust.

It is submitted that the District Court was in error in ruling that no conflict existed. It is submitted that the trustee has duties to the maker and the noteholder and a conflict arose.

3. DID THE DISTRICT COURT ERR BY HOLDING THAT A VALID SALE WAS CREATED BETWEEN NCNB FINANCIAL SERVICES AND PULASKI FURNITURE CORPORATION DESPITE THEIR LACK OF AGREEMENT AS TO THE DISPOSAL OF THE FIXTURES AT THE JULY 15 AUCTION?

The Appellant contends that no valid contract was created on July 15 because the terms of the auction were too vague for NCNB Financial Services, Pulaski Furniture, and the other bidders at the auction to achieve a "meeting of the minds." In Smith v. Farrell, 199 Va. 121, 98 S.E.2d 3 (1957), the Supreme Court of Virginia, reiterated the hornbook proposition that before a contract may be consummated, the parties must be in substantial

agreement about the material terms of the deal.

It is beyond dispute that Pulaski Furniture Services did not agree as to the disposal of the fixtures connected to the Coleman property. Agents for Pulaski Furniture Corporation testified that they believed that certain fixtures were included in the sale of the land. Agents for NCNB Financial Services testified that they believed they were selling only the "four walls and the land." No meeting of the minds regarding the disposal of the fixtures occurred on July 15.

The sale of the fixtures was a material element in the contract for the sale of the Coleman real estate. According to the statement of Barman, an agent of NCNB Financial Services, NCNB Financial Services was willing to let Pulaski Furniture out of its bid if the two entities could not agree on the disposal of the

fixtures. Since the sale would not proceed without the settlement of this controversy, the term must be considered material.

The Appellant does not deny that a contract for the sale of the Coleman property did eventually arise between Pulaski Furniture and NCNB Financial Services. It is the Appellant's contention that this sale violated the Virginia Code § 55 regulating the conduct of trustees in lien sales.

The lack of an auction at which the buyers were clear as to what was being sold violates Virginia Code § 55-59. The purpose of this section is to ensure that the rights of both parties to the lien will be protected. The grantor of the lien should get the highest possible price for his property; the grantee should be

able to sell the property and protect his investment in the loan.

The rights of Coleman Furniture, the grantor of the lien, were not protected in the present case. The auction did not produce the highest possible price because the bidders could not be sure what they were bidding upon. The mere fact that this sale of an uncertain property was advertised in accordance with the statute should not cause this court to overlook the fact that the interest of the Appellant were compromised. The Trustee sold the property quickly, but that was only half of his duties.

Appellant's rights were not protected by the subsequent creation of a contract between NCNB Financial Services and Pulaski Furniture. The Contract was not created as the result of a public auction but as a result of a private bargaining between the trustee and Pulaski Furniture

Corporation. This private sale by a trustee under a lien violates § 55, which mandates a sale by public auction. The statute does not mandate that the beginning process should commence with a public auction, it mandates that the property should be sold at public auction. The private sale does not meet this standard. The assignment of rights from Pulaski Furniture to NCNB Financial Services and back again should have no bearing on the rights created in Pulaski Furniture from the trustee. Contract rights are derivative: one cannot increase one's rights through their assignment. Hartford Fire Insurance Co. v. Mutual Savings, 193 Va. 269, 68 S.E.2d 541 (1952). If Pulaski Furniture had no rights under the contract of sale, it could assign none.

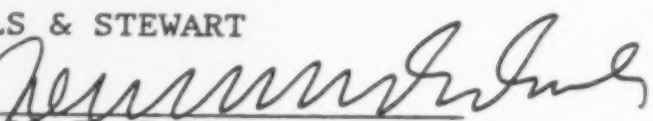
The Appellant, therefore, requests that the District Court be reversed

because no contract of sale valid under Virginia law exists or has existed between the trustee and Pulaski Furniture.

CONCLUSION

For the reasons stated above, your Plaintiff-Appellant, Shumate, respectfully submits that he is entitled to the relief requested through this brief. Due to the errors committed by the District Court at the trial of this matter on March 5 and 6, 1984, your Plaintiff-Appellant has been grievously injured and his only relief now lies with this Court.

RESPECTFULLY SUBMITTED,
JOSEPH B. SHUMATE, JR.

JENKINS & QUIGLEY
and
EARLS & STEWART
BY: 
DONALD E. EARLS

I, Donald E. Earls, do hereby certify that I have this 1st day of November, 1984, mailed a true copy of the foregoing Petition for Writ of Certiorari to the persons listed below.

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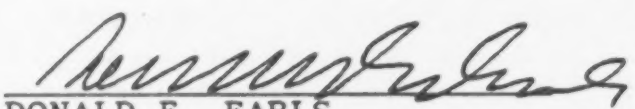

DONALD E. EARLS

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 84-1519

Joseph B. Shumate, Jr.,

Appellant,

v.

James F. Douthat, NCNB Financial Services, Inc., and Pulaski Furniture Corporation,

Appellees.

In Re:
Coleman Furniture Corporation,

Debtor.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen M. Williams, District Judge. (C/A 83-M-16R)

Argued:June 7, 1984 Decided:July 23, 1984
Before RUSSELL, MURNAGHAN, and ERVIN, Circuit Judges.
John C. Quigley, Jr., and Max Jenkins (Jenkins & Quigley on brief) for Appellant; Benjamin C. Ackerly (T. Justin Moore, III, and Hunton & Williams on brief) for Appellee Furniture Corporation; Thomas A. Leggette (William B. Poff; Daniel F. Layman and Woods, Rogers, Muse, Walker & Thornton on brief) for Appellee James F. Douthat; Stephen M. Hodges (Penn, Stuart, Eskridge & Jones; George V. Hanna, III; Hayden J. Silver, III; Moore, Van Allen & Allen on brief) for Appellee NCNB Financial Services, Inc.

PER CURIAM:

Joseph B. Shumate, a personal guarantor on a deed of trust, seeks to set aside the foreclosure sale of real property belonging to Coleman Furniture Corporation. The United States District Court for the Western District of Virginia found the sale valid in all respects. We affirm.

I.

On November 3, 1982, Coleman Furniture Corporation filed a Chapter 11 Bankruptcy petition. Three months later the district court appointed a trustee in bankruptcy. The trustee attempted to sell Coleman Furniture as a going concern but was unsuccessful. The trustee then abandoned the property, and on May 19, 1983, the district court entered an order of abandonment pursuant to 11 U.S.C. § 554. This order permitted North Carolina National Bank Financial Services (NCNB-FS)

to take possession of the abandoned assets and to dispose of those assets under its security documents free and clear of all encumbrances and liens.

On June 7, 1983, James Douthat, trustee under the deed of trust between NCNB-FS and Coleman Furniture, notified Coleman Furniture, Shumate, and the trustee in bankruptcy that the real property would be sold at foreclosures. On June 24, 1983, Douthat advised the parties that the equipment and remaining inventory of coleman would be sold at a separate public auction. Subsequently, Douthat advertised in two area newspapers that the foreclosure sale of real property belonging to Coleman Furniture would be held on July 15, 1983. Before the sale Shumate and Coleman Furniture filed a motion in the district court to enjoin the

sale. The district court denied the requested relief.

On July 15, 1983, Douthat conducted th foreclosure sale on the courthouse steps of the Pulaski Circuit Court with the assistance of the bankruptcy trustee for Coleman Furniture. Before the sale began, Douthat announced that he would be selling only "the four walls and the dirt." A lis of personal property not being sold was available to the public in attendance that if they were unsure whether a particular item was being sold with the realty, they should presume the item to be personal property and not included in the sale. The audience had an opportunity to as questions, but no one raised any questions, protested the sale, or requested that the sale be postponed. Douthat first took bids on the two separate tracts of land and then on the entire tract. Pulaski Furniture

Corporation was the higher bidder at two million dollars.

After the sale a dispute arose between NCNB-FS and Pulaski Furniture regarding whether certain items of personal property that were affixed to the building were sold with the realty. Because of this dispute, NCNB-FS agreed to purchase and Pulaski Furniture agreed to sell its two million dollar bid to NCNB-FS. Approximately three months after Pulaski Furniture had assigned its right of purchase to NCNB-FS, Pulaski Furniture reacquired the right from NCNB-FS for two million dollars, the amount of the original bid. Pulaski Furniture later purchased the personal property covered by a security agreement that was separate from the deed of trust at a private sale for approximately one million dollars.

II.

On appeal, Shumate argues that the contract between Pulaski Furniture and NCNB-FS was invalid and that the district court did not have jurisdiction to uphold the foreclosure sale. Shumate also argues that Douthat should not have been permitted to serve as trustee under the deed of trust because his position as attorney for NCNB-FS created a conflict of interest. Finally, Shumate contends that the sale was not conducted pursuant to the terms of the deed of trust and as advertised. We find no merit in any of these assertions.

First, we are not convinced that the district court lacked jurisdiction over

the abandoned property.[1] Under 11 U.S.C. § 554, the bankruptcy trustee may abandon property that is burdensome to the estate. In re Bennett, 13 Bankr. 643 (Bankr. W.D. Mich. 1981). Once property is abandoned, the trustee cannot later reclaim it. Matter of Enriquez, 22 Bankr. 934, 935-36 (Bankr. D. Neb. 1982). The trustee's abandonment, however, does not divest the district court of jurisdiction. Under 28 U.S.C. § 1471(a) and (b) (Supp. 1984), the

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[1] On November 9, 1983, this suit was transferred from the Pulaski County Circuit Court to the United States District Court on the joint motion of Shumate and the appellees. After the case was transferred, Shumate amended his complaint twice without objecting to the district court's jurisdiction. In July of 1983 Shumate had filed a separate proceeding in the district court to enjoin the foreclosure sale. In that action, Shumate alleged that the district court had jurisdiction over the abandoned property.

United States District Courts have original jurisdiction over all bankruptcy cases brought under title 11 and "all civil proceedings arising under title 11 or arising in or related to cases under title 11."[2] In re Kaiser, 722 F.2d 1574, 1578 (2d Cir. 1983). Accord In re

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2 28 U.S.C. § 1471(a) and (b) state:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11. (footnote omitted).
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

Guaranty Chevrolet, 35 Bankr. 381 (S.D. Cal. 1983); In re Color Craft Press, Ltd., 27 Bankr. 962 (D. Utah 1983). Because the foreclosure sale of the abandoned property in this case was related to the bankruptcy proceedings, we conclude that the district court properly exercised its jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b).

Second, Shumate was not a party to the contract between NCNB-FS and Pulaski Furniture or an intended beneficiary but rather an incidental beneficiary. See Richmond Shopping Center, Inc. v. Wiley N. Jackson Co., 220 Va. 135, 142, 255 S.E.2d 518, 523 (1979). He has no standing, therefore, to attack the validity of the contract.

Shumate's third contention that Douthat had a conflict of interest is also unpersuasive. The creditor's attorney may

serve as trustee under a deed of trust.[3] Terry v. Fitzgerald, 73 Va. (32 Gratt.) 843 (1879). The district court found no improprieties in Douthat's conduct as trustee. We conclude that the district court was not clearly erroneous in finding that Douthat properly fulfilled his duties as trustee. See Fed. R. Civ. P. 52(a).

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[3] In this case Douthat and Thomas T. Palm were appointed substitute trustees pursuant to the terms of the deed of trust. Shumate was aware of Douthat's appointment and could have objected prior to the foreclosure sale. Shumate, however, did not object until after the sale. The district court correctly concluded that Douthat was not automatically disqualified as trustee under Virginia law. See In re Taddeo, 685 F.2d 24 (2d Cir. 1982) (the effect of liens is determined by state law except when a federally enacted policy would be frustrated); In re Wallace, 31 Bankr. 64 (Bankr. D. Md. 1983) (state law governs the operation and validity of deeds of trust).

Finally, we find no merit in Shumate's assertion that Douthat failed to comply with tne terms of the deed of trust or the advertisement of the sale. At the beginning of the auction Douthat announced that he was selling only "the four walls and the dirt." Douthat invited questions, but no one raised any questions, protested the sale, or requested that the sale be postponed. Indeed, before bidding begins, the auctioneer may orally modify the advertised terms of the sale, and these modifications are binding upon the bidders. Holston v. Pennington, 225 Va. 551, 556, 304 S.E.2d 287, 290 (1983). Accordingly, we are not persuaded that the district court was clearly erroneous in finding that the sale was conducted properly. See Fed. R. Civ. P. 52(a).

III.

For the foregoing reasons the judgment of the district court is

AFFIRMED.[4]

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[4] In light of our disposition of this case, Pulaski Furniture Corporation's motion for leave to file transcript on June 20, 1984, is denied.

84-781

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR., PETITIONER

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL

SUPPLEMENTAL APPENDIX FOR
THE WRIT OF CERTIORARI

FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH B. SHUMATE, JR.,

Plaintiff,

v.

JAMES F. DOUTHAT, NCNB FINANCIAL SERVICES, INC. and PULASKI FURNITURE CORPORATION,

Defendants.

Civil Action No. 83-M-16 (R)

Abingdon, Virginia
May 15, 1984
2:17 O'Clock, P.M.

TRANSCRIPT OF BENCH OPINION
BEFORE THE HONORABLE GLEN M. WILLIAMS

TRANSCRIPT ORDERED BY:

BENJAMIN C. ACKERLY, ESQUIRE
(HUNTON & WILLIAMS)

APPEARANCES:

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Court Reporter:

Robert C. Haumesser
Official Court Reporter
Western District of Virginia
P.O. Box 924
Abingdon, Virginia 24210

(Proceedings begun at 2:17 O'Clock, P.M.

(The case was called.)

(Mr. Jenkins made an opening statement.)

(Mr. Ackerly made an opening statement.)

(Mr. Ackerly presented defendant Pulaski Furniture's evidence.)

(Mr. Jenkins presented the plaintiff's evidence.)

(Mr. Ackerly, Mr. Hodges and Mr. Poff argued the bond.)

(Mr. Jenkins responded.)

(Thereupon, the Court rendered the following Bench Opinion.)

THE COURT: Gentlemen, the way the Court views this matter, of course, to go back just a little bit, uh, I never did rule one way or the other on the matter of a bond being made. I chose, instead, to expedite the trial and try

the case on the merits and see where we were and, of course, as you all know, I decided the case on the merits on it and therefore there wasn't -- it was never necessary for me to go into the matter of the plaintiff having to make a bond or not in order to originally file the suite or to go forward with it.

Now, obviously ther is a potentially great loss. I think Mr. Hodges argument is correct that the bank has received two million dollars for the building portion or the real estate portion of it at least that. I'm not sure exactly how this was apportioned. But, at any rate, that was what the bid was made for.

Assuming that this sale, that the plaintiff would prevail on in this appeal and another sale would have to be gone through with, uh, any other bidder that might come into it would be in a

position of there being litigation over improvements or changes and so forth that would be in the building. It's very speculative as to what it might bring and Pulaski being in a position to rebid again might be in a position of wanting to bid very little in view of the situation would be that NCNB could be greatly harmed.

Now, it's not my desire to prevent anybody from appealing a case out of my court to a higher court. Far be it. And normally we don't have any bond except for a cost bond and that's all the Rules really provide for unless there is a Stay of Judgment in which case there's a Supersedeas Bond. But this is not a normal situation and I'm relying upon this Rule 8005 of the Bankruptcy Rules which reads that the Bankruptcy Court in which this case is

action for the Bankruptcy Court may suspend or order a continuance -- continuation of other proceedings in the case under the code or make other appropriate Order during the pendancy of an Appeal on such terms as will protect the right of all parties in interest.

Now, assuming that this Court is acting under the powers of the District Court rather than the Bankruptcy Court, I am taking the position that this Court has inherent power beyond the Rules to protect the litigants, the public and everyone that can be eventually damaged as the result of continuing on with this matter and I feel that NCNB has potential damage. I feel that Pulaski has potential damage. Now, I'm mindful of what has been testified to here about a sale that's coming up and that this may bring three million dollars. My

decision is appealable as I would understand it. In other words, the Rules set out that a matter of Bond should be presented, first of all, to the District Court and the District Court should rule on it and you have an appellate right on the matter of the Court of Appeals reviewing the amount of the Bond.

I would also say this and this would be for the benefit of my view to be passed on to the Court of Appeals upon hearing any matter on this bond. That if Bond is not allowed that the Court of Appeals should have an expedited Appeal and hear this thing within the next thirty days for the protection of everybody.

Now, I doubt if it makes much difference to whether I set the Bond at five-hundred-thousand dollars or at two million in once sense of the word in

regard to the ability to make it, but in view of all the circumstances in this case, I am of the opinion that the two million dollars is a proper bond and for the reasons that I've said here that's what I'm setting as a Supersedeas Bond and I consider that without a Bond being made that great harm could come if this thing was allowed to go on for a year with nobody able to make any plans or anything at all. As a matter of fact, it's something that two million dollars conceivably not touch the losses that could be suffered here and that's my view on it and I want to enter an Order to that effect and counsel for the plaintiff will try to do so before you leave. I'm going on with this trial that I'm in. If you will get me an Order immediately on it and so that the plaintiff can, if he sees fit to appeal

this Order to the Court of Appeals on the matter of the Bond.

MR. JENKINS: Would the Court note our objections and exceptions.

THE COURT: Yes, sir.

MR. JENKINS: And that will be done today, Your Honor. I can stick around and we will do it.

THE COURT: Well, I guess you can go down to Mr. Hodges' Office and make it up, couldn't you, or if you can't, get somebody here locally?

MR. JENKINS: Yes, sir. I'll be back in approximately thirty minutes with it.

MR. HODGES: I don't know if we'll have it in thirty minutes, but we'll do it this afternoon.

MR. JENKINS: Thank you, Your Honor.

THE COURT: Well, we'll take about

a ten minute recess. If you'll notify the attorneys, they can be getting set up.

(Proceedings concluded at 3:31 O'Clock, P.M.)

- - - - - - - -

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Robert C. Hawnessey

5/16/84

* * * * * * * *

I, Donald E. Earls, do hereby certify that I have this 21st day of November, 1984, mailed a true copy of the foregoing Supplemental Appendix for Writ of Certiorari to the persons listed below.

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(3)

No. 84-731

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, et al,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held, in accordance with applicable statutory and case law, that the District Court had jurisdiction of a suit to set aside a foreclosure sale of real property belonging to a bankrupt debtor where such suit was related to or arising in a bankruptcy matter.

2. Whether the Court of Appeals properly held that a creditor's attorney may act as one of the substitute trustees under a deed of trust where the decisions of Virginia's highest court established that he may so act and where there is no evidence of any impropriety.

3. Whether the Court of Appeals properly held, in accordance with Virginia law, that Shumate had no standing to challange the validity of a contract between Douthat and Pulaski and there was substantial evidence to support the District Court's findings that a valid contract was created.

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No. 84-731

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL,

Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by Joseph B. Shumate (Shumate) to set aside the foreclosure sale of real property (the Real Property) belonging to Coleman Furniture Corporation, a Chapter 11 bankruptcy debtor, (Coleman) and order a new sale. Respondent James F. Douthat (Douthat) is the substitute trustee who conducted the foreclosure sale pursuant to a first deed of trust (the First Deed of Trust) on the Real Property. Respondent NCNB Financial Services

(NCNB FS) is the holder of a note dated January 4, 1978, payable to the order of NCNB FS in the original principal amount of $3,500,000.00 executed by Coleman (the Note) and secured by the First Deed of Trust. Respondent Pulaski Furniture Corporation (Pulaski) was the high bidder at the foreclosure sale. Shumate is the former president of Coleman who held notes of Coleman secured by junior liens on the Real Property.

B. The Proceedings Below

On or about August 15, 1983 Shumate filed a complaint in the Circuit Court of Pulaski County, Virginia, seeking to set aside the foreclosure sale of the Real Property upon the grounds that it was improper for Douthat to act as substitute trustee under the Deed of Trust when he had served as attorney for NCNB FS in the Coleman bankruptcy proceeding and that Douthat failed to conduct the foreclosure sale fairly and impartially, resulting in the Real Property being sold for a grossly inadequate price. In connection with the complaint, Shumate caused to be

recorded in the Clerk's Office of the Circuit Court of Pulaski County on or about August 12, 1983 a memorandum of lis pendens reciting the fact that there was a suit pending in the Circuit Court of Pulaski County seeking to set aside the foreclosure sale.

On November 8, 1983 the Honorable James C. Turk, Judge of the United States District Court for the Western District of Virginia, entered an order, which all parties including Shumate consented to, transferring the complaint filed in the Pulaski County Circuit Court to the District Court. (App. B) Judge Turk subsequently recused himself and the case was assigned to the Honorable Glen M. Williams.

On January 23, 1984 Judge Williams entered an order that the lis pendens was void "in that the Circuit Court of Pulaski County, Virginia was without jurisdiction to hear the suit described in the lis pendens" and therefore the lis pendens should be quashed. Shumate subsequently recorded a second memorandum of lis pendens in the Circuit Court of Pulaski County describing the suit pending in the District

Court. On February 21, 1984 the District Court permitted Shumate to amend his complaint to add two additional grounds for setting the sale aside; that the Real Property was not sold in compliance with the terms of the First Deed of Trust and that the Real Property was not sold as provided for in the advertisement of the foreclosure sale. On March 5, 1984 the District Court permitted Shumate to amend his complaint a second time by adding thereto an allegation that the foreclosure sale was void because there was no meeting of the minds between the seller and buyer.

The case was tried on April 5 and 6, 1984 before Judge Williams and an advisory jury. At the conclusion of Shumate's evidence, the Respondents each moved for an involuntary dismissal pursuant to Rule 41(b), which was granted. Judgment was entered for the Respondents and the District Court approved and confirmed the July 15, 1983 foreclosure sale.

On April 16, 1984 Shumate filed a motion for a new trial, which was denied on April 27, 1984. On May 3, 1984 Shumate filed his notice of appeal to the United States Court of Appeals for the Fourth Circuit.

At no time subsequent to the July 15, 1983 foreclosure sale did Shumate seek to stay consummation of the sale pending the outcome of this litigation. The sale to Pulaski was consummated. When Shumate appealed to the Court of Appeals, Respondents asked the District Court to order Shumate to post a bond, even though no stay was requested, since the appeal would delay and perhaps jeopardize the renovation of the Real Property and its operation as a furniture plant employing initially 350 people in Pulaski County.

The District Court, on May 15, 1984, ordered that Shumate post a supersedeas bond in the amount of $2,000,000.00 as a condition of the appeal to protect the Respondents from injury during the pendency of the appeal. The bond was reduced by the Court of Appeals to $5,000.00 on May 18, 1984, because Shumate had not requested a stay, but the hearing on the merits of the appeal was accelerated in recognition of the fact that the pendency of the appeal, even though no stay was requested, was tantamount to a stay since the appeal was a cloud on title.

Because Shumate raised on appeal the question of jurisdiction, the Court of Appeals, to resolve such jurisdictional issue, took notice of certain court orders which were outside of the direct record in this case. Specifically, on May 19, 1983, Judge Turk entered an order in the Coleman bankruptcy case (the May 19 Order) abandoning the Real Property and modifying the automatic stay of 11 U.S.C. § 362(a) as to NCNB FS so as to permit NCNB FS to exercise its right as a secured creditor against certain assets of Coleman, including the Real Property as well as Coleman's machinery and equipment. (App. A) No appeal was taken from the May 19 Order. Subsequent to the July 15, 1983 foreclosure sale of the Real Property, and prior to this suit's transfer from the Pulaski County, Virginia, Circuit Court to the District Court, Shumate instituted three separate actions in the District Court, seeking first to enjoin the sale of Coleman's machinery and equipment by NCNB FS and then to enjoin the transfer of the machinery and equipment to the successful bidder pending resolution of this suit.

C. Statement of Facts

Coleman conveyed the Real Property to John B. Spiers, Jr. and Duane E. Mink, Trustees, by the First Deed of Trust dated December 28, 1977 to secure the obligations of Coleman to NCNB FS evidenced by the Note.

On November 3, 1982, Coleman filed a petition for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1101, et seq.) and was continued in possession of its property, including the Real Property, as debtor in possession. At the time of filing its Chapter 11 petition Coleman was in default in its undertakings and obligations under the Note.

On February 18, 1983 Judge Turk, who was presiding over the Coleman bankruptcy, entered an order appointing Bert Ely as Trustee of the estate of Coleman. Subsequent to his appointment as trustee, Ely retained the services of Hubert Thomas to assist Ely in trying to sell the assets of Coleman Furniture, including the Real Property, as a going concern. Those efforts were exhaustive but unsuccessful.

Judge Turk then entered the May 19 Order abandoning certain of the assets of Coleman, including the Real Property, and modifying the automatic stay of 11 U.S.C. § 362 so as to permit NCNB FS to dispose of those assets pursuant to its security documents free and clear of all liens, claims, encumbrances and obligations. There was no appeal of the May 19 Order.

Pursuant to the terms of the First Deed of Trust, Douthat and Thomas T. Palmer were appointed Substitute Trustees and on June 7, 1983 Douthat hand delivered his letter of the same date to Judge Turk, Shumate, and the Trustee in Bankruptcy. This letter indicated that Coleman had defaulted, it declared the entire unpaid balance immediately payable and stated that the Real Property secured by the Deed of Trust would be sold at foreclosure. Attached to the letter was a copy of the notice of trustee's sale. Shumate acknowledged receipt of the letter. Subsequently, the Substitute Trustees advertised in The Southwest Times and Roanoke Times & World News their intention to sell the Real Property at public foreclosure

sale on July 15, 1983. Shumate acknowledged having seen the advertisement in the local paper. Shumate also acknowledged on cross examination that, prior to July 15, 1983 he had seen a letter dated June 24, 1983 from Douthat addressed to Shumate's counsel, advising that the inventory and equipment was going to be sold at a separate sale on August 23 and 24, 1983.

On July 12, 1983 Coleman and Shumate filed a Bill of Complaint in the Circuit Court of Pulaski County seeking to enjoin the Substitute Trustees' sale of the Real Property. By order entered that same day, the Circuit Court of Pulaski County dismissed the Complaint, with leave to the parties to take such action as they deem appropriate in the United States District Court. Immediately thereafter Shumate, individually and on behalf on Coleman, filed a complaint in the District Court seeking to enjoin the foreclosure sale of the Real Property. Judge Turk, by order from the bench, denied Shumate's request to enjoin the foreclosure sale. There was no appeal of this order.

The foreclosure sale on July 15, 1983 was conducted by Douthat as Substitute Trustee and he was assisted by Roy V. Creasy, the new Trustee in Bankruptcy for Coleman. Between 100 and 200 people attended the sale. Prior to commencement of the sale, which was held on the courthouse steps of the Pulaski Circuit Court, Douthat announced, according to Shumate's testimony, that he was only selling the real estate and the four walls. Specifically, Douthat referred to an appraisal which he had available that included a list of personal property which was not being sold. According to Shumate, Douthat invited those present at the sale to speak up if they had any questions as to what was being sold. According to Marvin Barman, an officer of NCNB FS called by Shumate as an adverse witness, Shumate did not ask any questions or look at the material Douthat had available for examination. There were no questions. No one professed any confusion. No one protested the sale, and no one asked that the sale be postponed.

The auction was broken into three parts. Initially, bids were taken on unimproved land in Dublin, Virginia;[1/] then on the land and improvements in Pulaski, Virginia;[2/] then a third set of bids was taken on the whole, with the bid going to the highest of either the bids on the sum of the parts or of the bid on the whole.

Barman and Ira Crawford, an employee of Pulaski, testified that after an initial bid by a local Pulaski real estate agent the subsequent bidding was between NCNB FS and Pulaski, that the sale was adjourned several times for Barman to call for instructions and that Pulaski was the high bidder at $2,000,000.00. In accordance with the terms of the sale, Pulaski deposited $200,000.00 with Douthat.

1/ This tract of land consists of 106.47 acres of vacant land adjacent to the Town of Dublin in Pulaski County, Virginia.

2/ This property consists of Plant No. 1 and Plant No. 2 of Coleman, containing approximately 800,000 square feet of improvements constructed between 1923 and 1966 and used by Coleman as a furniture manufacturing facility which had the capacity of employing 700-800 workers.

The only evidence offered by Shumate in support of his allegation that the sale was void because there was no meeting of the minds as to what was being sold was the adverse testimony of Barman and Crawford. They testified that subsequent to the foreclosure sale, a dispute arose between Pulaski and NCNB FS as to whether certain items of personal property were included in the July 15, 1983 foreclosure sale. Barman testified that Douthat announced at the beginning of the auction that he was only selling real estate, "the four walls and the dirt", that if anyone had any questions they should speak up, that no one did so, and that if anyone was in doubt as to whether property was real or personal they should assume it was personal and not being sold. Crawford, who attended the sale on behalf of Pulaski, acknowledged that he may not have heard the instructions given by Douthat at the beginning of the sale since he and Mr. T. G. Wampler, the other representative of Pulaski at the sale, were busy discussing their bidding strategy.

Barman testified that as a result of this dispute with Pulaski, and to avoid costly litigation, NCNB FS agreed to purchase, and Pulaski agreed to sell, its $2,000,000.00 bid to NCNB FS. By agreement dated August 17, 1983 between Pulaski, NCNB FS and Thomas T. Palmer as Substitute Trustee, Pulaski assigned all its right, title and interest in its bid to NCNB FS in return for NCNB FS' agreement to pay to Pulaski the sum of $200,000.00, being the deposit paid by Pulaski to Douthat. Some three months later Pulaski reacquired its bid from NCNB FS for $2,000,000.00, the amount of the original bid. Pulaski then purchased from NCNB FS, at a private sale for approximately $1,000,000.00, certain personal property of Coleman that was covered by a security agreement in favor of NCNB FS which was separate from the deed of trust.

Other than establishing that Douthat represented NCNB FS in the Coleman bankruptcy proceeding, Shumate offered no evidence to support his allegation that the foreclosure sale should be set aside because Douthat acted as Substitute Trustee. Barman testified that NCNB FS used

Douthat as substitute trustee to save money since Douthat was compensated by the hour rather than on a percentage of the sales price.

II.

REASONS FOR DENYING THE WRIT

Shumate's Petition For Writ Of Certiorari should be denied as there is no conflict between the holding of the Court of Appeals and the decisions of this Court or the decisions of the circuits. Shumate alleges no departure from the accepted and usual course of judicial proceedings nor suggests the existence of an important federal question involving matters of public concern reaching constitutional dimensions.[3/]

The Court of Appeals' decision is in full accord with applicable statutory law and with the decisions of other federal courts and the Supreme Court of Virginia.

3/ In fact, Shumate's Petition is a verbatum recitation of the first three issues contained in the brief he submitted in the Court of Appeals.

A. The Court of Appeals' Decision That The District Court Had Jurisdiction Of This Suit Is In Accordance With Applicable Statutory And Case Law

Shumate never questioned the jurisdiction of the District Court to hear his complaint to set aside the sale of the Real Property until his appeal.[4/] On appeal he argued that jurisdiction was lacking because the Real Property was abandoned as an asset of the Coleman bankruptcy and once a bankruptcy trustee abandons an

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4/ While Respondents acknowledge that jurisdiction may be raised for the first time on appeal and that such jurisdiction cannot be consented to or waived, this Court should note that this suit was transferred from the Pulaski County, Virginia, Circuit Court to the District Court upon the joint motion of Shumate and the Respondents (see November 8, 1983, Order, App. B) and, after the case was properly transferred to the District Court, Shumate sought and was granted leave to amend his Complaint on two separate occasions, without ever objecting to jurisdiction. In addition, subsequent to the initiation of this suit and prior to its transfer to the District Court, Shumate filed three separate adversary proceedings in the District Court seeking first to enjoin the public auction sale of Coleman's machinery and equipment by NCNB FS and then to enjoin the transfer of such machinery and equipment to the successful bidders. In each case Shumate alleged that the District Court had jurisdiction even though the machinery and equipment had been abandoned along with the Real Property in the May 19 Order.

asset, he is forever precluded from reclaiming it. The Court of Appeals determined that the District Court had jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b). The Court of Appeals reasoned that although the bankruptcy trustee may abandon property and once that property is abandoned it cannot be reclaimed by the trustee, the abandonment does not divest the District Court of jurisdiction.

Shumate confuses the powers of the trustee in bankruptcy with the jurisdiction of the District Court over bankruptcy matters. The fact that a trustee may not reclaim the Real Property is a matter entirely separate and distinct from the jurisdiction of the District Court over the Real Property. In the case of In re Bennett, 13 B.R. 643 (Bankr. W.D. Mich. 1981) it was held that the abandonment of property would not preclude the bankruptcy court from hearing a complaint subsequently filed by the debtor to avoid a security interest in that property.

Property which is abandoned from the bankruptcy estate passes back to the debtor and becomes, for

bankruptcy purposes, property of the debtor. In re Motley, 10 B.R. 141, 145 (Bankr. M.D. Ga. 1981), citing 2 Collier on Bankruptcy ¶ 362.04(5) p. 362-34 (15th ed.). The automatic stay provisions of the Bankruptcy Code apply to acts against property of the debtor.[5/] Since abandoned property is property of the debtor the application of the automatic stay to actions against property of the debtor recognizes that the bankruptcy court retains jurisdiction over property even though it is abandoned. In Motley, the holder of a second deed of trust on the debtor's real estate foreclosed on that property after it had been abandoned, without first obtaining relief from the automatic stay. The court held that although the property reverted to the debtor upon abandonment the automatic stay remained in effect as to the abandoned property.

Also, the bankruptcy court retained jurisdiction over the Real Property under 28 U.S.C. § 1471(e) which states that:

5/ 11 U.S.C. § 362(a)(5) stays acts to create, perfect or enforce liens securing prepetition claims against property of the debtor.

> The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

It is undisputed that the Real Property belonged to Coleman as of the commencement of the case and the case was still pending before the District Court at the time this suit was tried. Therefore, the District Court, sitting in this case as a bankruptcy court, had jurisdiction over the Real Property.

The Court of Appeals held that the District Court had jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b).[6/]

6/ 28 U.S.C. § 1471(a) and (b) states that:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

The Court of Appeals stated that United States District Courts have original jurisdiction over all bankruptcy matters brought under Title 11 and all civil proceedings arising under or related to bankruptcy matters,[7/] and since the foreclosure sale of the abandoned property in this case was related to the bankruptcy proceedings, the District Court properly exercised its jurisdiction.

Shumate's suit clearly related to the bankruptcy proceedings. The May 19 Order specifically authorized NCNB FS to enforce its security interest in the Real Property and to pass title free and clear of all liens on the Real Property, plus it directed NCNB FS to report to the District Court concerning the sale and the application

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7/ This broad jurisdictional grant was intended to be exercised by bankruptcy courts pursuant to § 1471(c). However, this Court, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), held that the exercise of jurisdiction by a non-Article III tribunal was unconstitutional. But this decision did not invalidate the jurisdictional grant of § 1471 to district courts. In re Kaiser, 722 F.2d 1574 (2d Cir. 1983). Accord In re Guaranty Chevrolet, 35 B.R. 381 (Bankr. S.D. Cal. 1983). See also, Northern Pipeline Construction Co., 458 U.S. at 54, n. 3.

of the proceeds from the sale.[8/] Shumate's suit challenges the very essence of the District Court's May 19 Order. It seeks to prevent the conveyance of the Real Property to Pulaski, to prevent NCNB FS from completing the enforcement of its security interest, and to set aside a foreclosure authorized by the May 19 Order. Shumate's suit clearly related to the bankruptcy proceedings since it attacked an order entered by the District Court in the bankruptcy proceeding relating to the administration of the case.

For these reasons the abandonment of the Real Property does not, as Shumate argues, divest the District Court of jurisdiction. The Court of Appeals was correct when it held that the District Court properly exercised its jurisdiction under 28 U.S.C. § 1471(a) and (b) to hear and decide Shumate's Complaint.

8/ Specifically, the May 19 Order retained jurisdiction over the foreclosure sale for the purpose of determining that there was a proper accounting and allocation of the sale proceeds. This was important to the administration of the bankruptcy estate because all of the assets against which NCNB FS claimed a lien had not been abandoned and were subject to a claim by NCNB FS in the event the foreclosure sale left NCNB FS with a deficiency.

B. In Affirming the District Court's Finding That Douthat Properly Performed His Duties As A Substitute Trustee Under A Deed of Trust, the Court of Appeals Acted in Accordance With the Decisions of Virginia's Highest Court and Properly Concluded That Such Finding Was Not Clearly Erroneous

As the Court of Appeals recognized, under Virginia law a creditor's attorney may serve as trustee under a deed of trust. Terry v. Fitzgerald, 73 Va. (32 Gratt.) 843 (1879); Goddin v. Vaughn's Ex'x, 55 Va. (14 Gratt.) 102 (1858). If it were otherwise, the vast number of foreclosure sales in Virginia would be subject to attack since it is quite common for the creditor's attorney to act as the trustee under a deed of trust.

Illustrative of the Virginia rule is Goddin. There, the defendant-appellant raised as error, inter alia, the lower court's appointment of plaintiff's counsel as the commissioner to sell the property in controversy if defendant should fail to comply with the court's decree. In rejecting this claim of error, the Court stated:

> It is the constant practice of the courts to name the counsel prosecuting a claim to a decree for the sale of property as the commissioner, and I am not aware that the legality of such an appointment has been heretofore questioned. . . .

Goddin, 55 Va. at 127-28.

Similarly, in reversing the circuit court's dissolution of an injunction enjoining the sale of property under a deed of trust, the Supreme Court of Virginia in Terry, 73 Va. at 852, opined that while the lower court should have retained the cause and had the sale made under its supervision, it could have appointed as commissioner for such sale the creditor's attorney who had been made the substitute trustee, provided that he was not otherwise deemed unfit. Thus, under Virginia law the fact that Douthat was also the creditor's attorney did not of itself incapacitate him from accepting the trust. Other deed of trust states also follow this rule. Donaldson v. Mansel, 615 S.W.2d 799 (Tex. 1980); Pence v. Jamison, 94 S.E. 383 (W. Va. 1917).

It should further be noted that Legal Ethics Opinion Number 336, readopted by the Virginia State Bar Council in 1983, recognized the propriety of the creditor's attorney being substituted as the trustee under a deed of trust. That Opinion states:

> Trustee on a second deed of trust for the benefit of seller represented buyer in a real estate closing. Seller was not represented. When buyer defaulted on the second deed of trust, seller retained counsel who requested that he be substituted as trustee. The trustee should resign as requested.

It follows, therefore, that if the initial trustee was required to resign when requested, the creditor's attorney who made such request could appropriately be substituted as trustee.

Despite this authority to the contrary, Shumate argues that the Court of Appeals erred in affirming the judgment of the District Court. Not being able to point to any evidence which indicates that Douthat acted other than properly in performing his duties as a substitute trustee, Shumate is forced to claim that the mere fact that Douthat was also the creditor's attorney in litigation

pending before the bankruptcy court, standing alone, automatically disqualified him as a trustee under Virginia law. The basis for Shumate's argument is dictum contained in a legal encyclopaedia. But this dictum is not the law of Virginia and is without merit.

Moreover, as the Court of Appeals further recognized, Shumate was aware of Douthat's appointment as one of the substitute trustees and could have objected prior to the foreclosure sale. At the trial, Shumate conceded knowing in early June of 1983 that Douthat had been made one of the substitute trustees under the deed of trust. He admitted receiving Douthat's letter of June 7, 1983, indicating that Coleman's property was to be sold. Yet neither during the five week period prior to the sale nor during the sale did he ever object to Douthat acting as a substitute trustee. Indeed, the day before the foreclosure sale Shumate was present in the chambers of Judge Turk when Douthat explained how the sale would take place. Shumate, however, said nothing.

If Shumate was concerned about any possible conflict caused by Douthat acting as one of the substitute trustees, he could have asked Douthat to step aside prior to the sale or could have sought an order having the court supervise the sale. Terry, 73 Va. at 850. But Shumate did neither. In fact, in each of his unsuccessful suits to enjoin the sale brought in the Circuit Court of Pulaski County and in the District Court he failed even to raise the issue of a possible conflict of interest. Rather, it was first raised one month after the sale.

By failing to object while having full knowledge that Douthat was acting as a substitute trustee, Shumate waived any right to object and is estopped because of laches from raising the bald conclusory claim of an alleged conflict of interest. Stokes v. Hinden, 85 F.2d 200 (D.C. App. 1936) (Because the appellants knew before the sale that the trustee was an employee of the attorneys for the creditor and had the opportunity to advise the court of any disqualifying facts, they cannot complain after the sale has been completed.); Ravold v. Grumme, 94 S.W. 298 (Mo.

1906) (Because the appellant knew before the sale that the trustee was the son of the creditor and failed to make a timely application to enjoin or prevent the sale, she is barred by laches from seeking relief after the sale has occurred.).

In summary, Shumate's claim of a conflict lacks merit because the Court of Appeals properly applied Virginia law, because it properly concluded that the District Court's finding was not clearly erroneous, and because Shumate waived any objection and is estopped by his own inaction.

C. The Court of Appeals Properly Held In Accordance With Virginia Law That Shumate Had No Standing To Challenge The Validity Of A Contract Between Douthat And Pulaski And There Was Substantial Evidence To Support The District Court's Findings That A Valid Contract Was Created

The District Court found that a valid and enforceable contract for the sale of the Real Property was created at the July 15, 1983 sale. Although the District Court's finding is based on substantial evidence in the record and was affirmed by the Court of Appeals, Shumate nonetheless

contends that the finding is clearly erroneous because Pulaski bid on the Real Property with the misapprehension that certain personal property was also being sold at the auction. Shumate thus claims that there was no "meeting of the minds" at the auction, and therefore no sale occurred.

As the Court of Appeals held below, however, Shumate has no standing under Virginia law to challenge the validity of the contract between Douthat and Pulaski's representative. Further, the evidence at trial demonstrated that Pulaski failed to listen to Douthat's announcements prior to the auction; these announcements clearly informed potential bidders that certain personal property was not being offered for sale. The law of Virginia provides that Pulaski's failure to hear Douthat's announcements at the sale does not provide grounds to set the sale aside.

1. Shumate Lacks Standing to Set Aside The Sale On The Grounds That Pulaski Was Mistaken About The Terms Of The Sale

The Court of Appeals properly concluded that Shumate lacks standing to set aside the sale on the grounds that there was no meeting of the minds. Shumate was not a party to the contract of sale nor was he intended to benefit from the contract. For a third party beneficiary to maintain an action on a contract, "[he] must clearly show that the contracting parties definitely intended the contract to confer a benefit upon him . . .; incidental beneficiaries may not sue thereon." Richmond Shopping Center, Inc. v. Wiley N. Jackson Co., 220 Va. 135, 142, 255 S.E.2d 518, 523 (1979) (citations omitted); see also, Valley Landscape Co., Inc. v. Rolland, 218 Va. 257, 237 S.E.2d 120 (1977); Graybar Electric Co. v. Doley, 273 F.2d 394 (4th Cir. 1959).

Shumate was not a party to the sales contract, nor did Douthat or Pulaski intend that he be a beneficiary. Under the sales contract, Pulaski's primary intent was to benefit NCNB FS by paying $2,000,000.00 for the Real

Property. Shumate did not and was not intended to benefit from the sale. Although his liability as the guarantor of Coleman's obligations to NCNB FS was reduced, this only incidentally benefitted Shumate, and incidental beneficiaries are not entitled to standing as third party beneficiaries. See Norfolk-Portsmouth Newspapers, Inc. v. Stott, 208 Va. 228, 231, 156 S.E.2d 610, 612 (1967).

Shumate also lacks standing to challenge the foreclosure sale on the grounds of mistake because a contract made under one party's mistake is only voidable by the mistaken party. S&J Associates v. Jay's Trucking Co., Inc., 26 B.R. 73, 76 (Bankr. E.D. Va. 1982); Restatement (Second) of Contracts § 153 (1981). Pulaski, not Shumate, was the mistaken party, and only the mistaken party can avoid the contract. Rather than seeking to void the contract produced at the auction, the parties instead chose to ratify the contract. As ratification of a voidable contract "extinguishes the power of avoidance," the rights of any party, including Shumate, to set aside the sale were terminated once Pulaski assigned its bid to NCNB FS. See

Restatement (Second) of Contracts § 7 (1981). For these reasons the Court of Appeals correctly held that Shumate lacks standing to challenge the foreclosure sale on the grounds that there was no meeting of the minds between Douthat and Pulaski at the auction.

2. The Trial Court Properly Found That A Binding Contract of Sale Was Created Between Douthat and Pulaski At The July 15, 1983 Sale

Regardless of whether Shumate possesses standing to challenge the July 15, 1983 contract between Douthat and Pulaski, there is substantial evidence in the record to support the District Court's finding that the sale of July 15, 1983 created a binding and enforceable obligation on Pulaski to purchase the Real Property. Douthat announced plainly and clearly the terms of the sale, and, although Pulaski may have misunderstood or failed to hear the terms announced, these terms were still binding on Pulaski. See Holston v. Pennington, 255 Va. 551, 304 S.E.2d 287 (1983); Definite Contract Building & Loan Ass'n v. Tumin, 158 Va. 771, 164 S.E. 562 (1932). Shumate's

contentions that the terms of the sale were too vague, or that Pulaski was justifiably mistaken about the terms of the auction, are unsupported by his own evidence. Thus, contrary to Shumate's contention, Pulaski's subsequent assignment of its bid is not voidable as a "private" sale in violation of Va. Code § 55-59, but rather stands as a proper assignment of Pulaski's previously acquired right to purchase the Real Property.

At the trial both Marvin Barman, a representative of NCNB FS, and Shumate testified that Douthat began the auction by announcing that he was selling only "the four walls and the dirt." He specifically excluded certain personal property from the sale, including the dust collector system, the machinery and equipment, and other personal property. Douthat also invited the surrounding audience of 100 to 200 persons to examine a plat and an appraisal which described the Real Property. If the audience had any questions about what was being sold, he encouraged them to ask their questions. No person did. Finally, Douthat stated that if anyone had a doubt as to whether a

particular item was real or personal property, he should consider the item to be personal property.

Ira Crawford, one of the Pulaski employees who attended the auction, was unable to recall these announcements. In fact, Crawford testified that he probably was not listening to everything Douthat said because he was concentrating on preparing to bid.

The terms of sale orally announced at an auction constitute a continuing offer by the trustee, subject only to acceptance upon submission of a bid. Once the bid is made in response to the announced terms, and knocked down, the contract is created at that instant. Holston, 304 S.E.2d at 290. The mere fact that Pulaski failed to hear or may have misunderstood the announced terms does not establish that no sale occurred. Rather, "[w]here the terms and conditions of an auction sale are plain and unambiguous and are plainly announced at the time and place of sale, they are binding upon a purchaser at the sale, whether he heard them announced or not and though he may have not understood them." Tumin, 164 S.E. at 565. In Tumin, the

purchaser had failed to hear the auctioneer's oral announcement that the property was being sold subject to a prior lien. At the trial of the action seeking to enforce the purchaser's bid, the purchaser proferred to the trial court a jury instruction that stated there could be no sale if the purchaser had misunderstood the terms of the sale. The Supreme Court of Virginia upheld the trial court's refusal to give this instruction, and noted that the purchaser's failure to hear, or her misunderstanding of, the auctioneer's announcement did not void her bid. Id.

The law of mistake in Virginia similarly offers no support for Shumate's contentions. A unilateral mistake does not suffice to set aside a sale, the mistake must instead be mutual. Branton v. Jones, 222 Va. 305, 281 S.E.2d 799 (1981); Pechin v. Porterfield, 128 Va. 53, 104 S.E. 695 (1920); Redd v. Dyer, 83 Va. 331, 2 S.E. 283 (1887). In Branton, the vendor of property at a judicial sale sought to set aside the sale upon learning that the parcel sold contained less acreage than the seller had believed. The Court refused to rescind the sale, holding

that before it could do so, the "mistake must be mutual . . . unless it was 'induced by the fraud or culpable negligence of the other.'" Branton, 281 S.E.2d at 800-801 (citations omitted). No evidence of fraud or negligence has been presented or alleged here. The evidence at trial instead established that both Douthat and Barman clearly understood the terms of the sale, and any mistake was solely attributable to Pulaski.

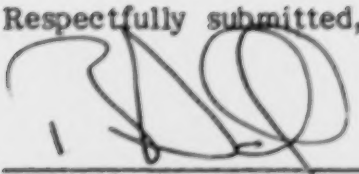
Thus Shumate's contentions that the July 15, 1983 sale was invalid find no support under Virginia law. The Court of Appeals properly held that Shumate had no standing to invalidate the sale, and the District Court's finding that the July 15, 1983 sale created a binding, enforceable contract of sale between Pulaski and Douthat is based on ample and substantial evidence in the record.

III.

CONCLUSION

For these reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,



Benjamin C. Ackerly
Counsel of Record for
the Respondents

December 3, 1984

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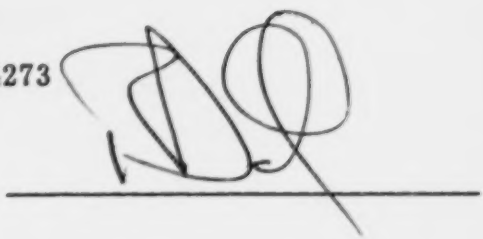
704/374-1300

Counsel for NCNB Financial Services

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 1984 I have mailed, postage prepaid, three copies of the foregoing JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to counsel for the Petitioner at the following address:

Donald E. Earls
940 Park Avenue
P.O. Box 710
Norton, Virginia 24273



Sworn to and subscribed before me this the 3rd day of December, 1984.

Lynn Cutright
Notary Public

My Commission Expires June 13, 1988

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC.,

Plaintiff,

v.

COLEMAN FURNITURE CORPORATION, ET AL,

Defendants.

May 19, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	
	)	
COLEMAN FURNITURE CORPORATION	)	Bankruptcy No. 7-82-01410
	)	
Debtor	)	
	)	
NCNB FINANCIAL SERVICES, INC.,	)	Adversary Proceeding No. 7-82-0806
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
COLEMAN FURNITURE CORPORATION ET AL.,	)	
	)	
Defendants.	)	

Came this day, Coleman Furniture Corporation, J. B. Shumate, Jr., NCNB Financial Services, Inc. and Bert Ely, Trustee, by counsel, pursuant to proper notice and hearing. Having heard the argument of counsel, the Court finds and concludes that:

1. DMI Furniture, Inc. has withdrawn its offer to purchase certain assets of Coleman Furniture Corporation ("debtor") on the terms set forth in the order entered herein April 29, 1983, (the "order"), requiring said order to be modified.

2. A reorganization of the debtor whereby the debtor would continue operations is not feasible as there are no reasonable prospects for a successful reorganization of the debtor.

3. A sale of the debtor as a going concern is not feasible.

4. NCNB Financial Services ("Financial Services") has a valid, perfected and properly procured security interest in the assets of the debtor which is a valid, prior, first lien security interest in such assets; and

5. The Court in its discretion should grant the motion of Financial Services to abandon the assets of the debtor to Financial Services and to modify the stay now in effect to allow Financial Services to realize on its security interest in said assets.

Accordingly, it is hereby ADJUDGED and ORDERED that:

1. All of the assets of the debtor, excluding choses in action, the debtor's Pension Fund and certain monies to be held by the Trustee as hereinafter described, are abandoned from the debtor's estate to Financial

Services and the stay in effect pursuant to 11 U.S.C. § 362 is modified as to Financial Services to allow Financial Services to take possession of all assets abandoned herein and to realize on its security interest in said assets.

2. Financial Services, under the terms of its security documents, is authorized to enter into and execute such documents transferring title to the assets of the debtor abandoned herein as may be necessary to pass full and complete title, free and clear of all liens, claims, encumbrances and obligations.

3. Financial Services shall immediately receive the assets of the debtor pursuant to this Order, except as otherwise herein provided, with any funds realized from said assets to be applied by Financial Services to its secured debt.

4. The Trustee is authorized to use NCNB National Bank of North Carolina as his principal depository.

5. The Trustee shall collect from the current outstanding accounts receivable of the debtor a sum not to exceed $175,000, to be held by the Trustee in an account at NCNB National Bank and not now disbursed to

Financial Services, which funds shall be available for the payment of such priority claims and administrative expenses as hereafter determined by the Court with the excess remaining paid to Financial Services. Financial Services shall immediatey receive the other monies held by the Trustee including monies collected from the outstanding accounts receivable of the debtor.

6. Financial Services is permitted to offer to purchase the claims of the unsecured creditors of the debtor, excluding the claims of J. B. Shumate, Jr., if any, for the sum of $37,500, which offer shall be tendered to Raymond R. Robrecht, Esq., attorney for the Creditors Committee, and shall be for the payment of $37,500 (which sum may include attorney's fees for the attorney for the Creditors Committee as may be approved by the Court) to those consenting unsecured creditors, conditioned upon the acceptance of eighty (80) percent of said unsecured creditors, both in number and amount. If approved by Raymond R. Robrecht, this offer shall be submitted to said unsecured creditors for acceptance or rejection on or before July 5, 1983, together with such information which Raymond R. Robrecht may determine necessary.

7. Bert Ely was appointed trustee by this Court on February 10, 1983, to determine, among other things, the feasibility of operating the business of the debtor as a going concern. Mr. Ely has now reported to the Court that the operation of the business as a going concern is not feasible and that the assets of the debtor as described above should be abandoned to Financial Services. As a result of this abandonment, Mr. Ely has determined that it is no longer necessary or is the best interests of the Estate for him to continue as Trustee and has tendered his resignation to the Court. The Court accepts the resignation of Mr. Ely and appoints Roy V. Creasy as Trustee effective May 17, 1983.

8. This proceeding is continued on the docket of this Court for a report concerning any sale of the assets of Coleman, any administrative expenses incurred in this proceeding, the report of Raymond R. Robrecht of the acceptance or rejection of the offer of Financial Services to the unsecured creditors, and the report of Financial Services of the application of monies paid to it on the outstanding indebtedness secured by said assets together with such other matters as may be properly before the Court.

9. The order is intended to modify and supplement the order entered herein on April 29, 1983.

ENTER:

s/James C. Turk
Judge

I request the entry of this Order:

s/James F. Douthat
Counsel for NCNB Financial Services Inc.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC.,

Plaintiff,

v.

COLEMAN FURNITURE CORPORATION, ET AL,

Defendants.

November 8, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re	
COLEMAN FURNITURE CORPORATION,	Bankruptcy No. 7-82-01410
Debtor	Adversary Proceeding No. 7-82-0806
NCNB FINANCIAL SERVICES, INC.,	
Plaintiff,	(Re: Transfer of Chancery # 5081 pending in Circuit Court, Pulaski County)
v.	
COLEMAN FURNITURE CORPORATION, ET AL.,	
Defendants.	

Came this day, Joe B. Shumate, Jr , Pulaski Furniture Corporation, NCNB Financial Services, Inc., and James F. Douthat, Substitute Trustee, by counsel, and represented (1) that Joe B. Shumate, Jr., is the complainant in a cause pending in the Circuit Court of Pulaski County, Virginia, Chancery No. 5081, seeking to declare the trustee's sale of real estate described therein to be null and void; and (2) that the

respondants therein, NCNB Financial Services, Inc., Pulaski Furniture Corporation and James F. Douthat, Substitute Trustee, filed a motion to dismiss said cause, alleging the United States District Court for the Western District of Virginia to have the sole and exclusive jurisdiction of the matters at issue therein and; further the parties hereto do hereby move this Court to transfer said cause to the United States District Court for the Western District of Virginia, Roanoke Division, and, having heard and considered the argument of counsel and being advised that related actions to said cause are pending in the United States District Court for the Western District of Virginia, and, being of the view that a substantial economy of time and money for the litigants and this Court can be achieved by affecting said transfer, it is hereby ORDERED that said cause be and hereby is transferred to the United States District Court for the Western District of Virginia, Roanoke Division, and the Clerk of the Circuit Court of Pulaski is directed to forward all

papers filed therein to the Clerk of the United States District Court for the Western District of Virginia.

ENTERED: 8th day of November, 19

s/James C. Turk
James C. Turk, Chief Judge

We request the entry of this Order:

Joe B. Shumate, Jr.

By: _____
John C. Quigley, Jr.
P.O. Box 886
Radford, Virginia 24141

NCNB Financial Services
James F. Douthat, Substitute Trustee

By: s/James F. Douthat
James F. Douthat
Hazelgrove, Dickinson, Rea, Smeltzer & Brown
P.O. Box 1218
Roanoke, Virginia 24006-1218

George V. Hanna, III
Moore, Van Allen and Allen
3000 NCNB Plaza
Charlotte, North Carolina 28280

Pulaski Furniture Corporation

By: s/Benjamin C. Ackerly (jfd)

Benjamin C. Ackerly
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOE B. SHUMATE, JR.,

Plaintiff,

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL,

Defendants.

APRIL 6, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	
	)	
COLEMAN FURNITURE CORPORATION,	)	
	)	
Debtor	)	
	)	
JOE B. SHUMATE, JR.,	)	No. 83-M-16-R
	)	(Re: Transfer of
Plaintiff,	)	Chancery No. 5081
	)	pending in Circuit
	)	Court of Pulaski
	)	County)
JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, et al.	)	
	)	
Defendants.	)	

In accordance with a bench opinion, and after having heard the plaintiff's evidence in this case and argument of counsel, the motions of each of the defendants for a directed verdict are hereby granted, and judgment is entered on behalf of all the defendants. The sale which is the subject of this dispute is approved and confirmed and this case is hereby dismissed and stricken from the docket of the court.

ENTER: This 6th day of April, 1984

s/Glen M. Williams
U. S. District Judge